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In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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I. THE BRIEF OF STANDARD OIL COMPANY

The brief filed by Standard is, in large measure, unresponsive to the Government's contentions. By stating those contentions incorrectly (*infra*, pp. 13, 19–20), and by once again attempting to disavow its prior repeated admissions (*infra*, pp. 12–19), Standard now apparently seeks to obscure—under a haze of alleged "factual" questions—the issue on which certiorari was granted.[1] Standard (Br. 2, 14–15, 20, 24–28) argues that these alleged "factual" questions were the basis of the Court of Appeals' decision, that "This Court Should Accept the Conclusion Below That Respond-

[1] This issue, Standard contends (Br. Opp. 6), "was not adjudicated below". See the Commission's Reply Brief in Support of Petition for Certiorari, pp. 2–5.

ent's Defense Was 'Firmly Established' by the Record" (Br. 64), and that "This Court Will Not Supplant the Court of Appeals as the Initial Reviewer of Administrative Action" (Br. 66). Therefore, Standard argues, this Court must affirm.

"But 'issue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment * * *." *Watts* v. *Indiana*, 338 U. S. 49, 51 (per Frankfurter, J.). Particularly is this so in the instant case since the court below expressly denied that the case presented any "factual" question (*infra*, pp. 2–5). Moreover, the court's statements relied upon by Standard as being "factual" are either immaterial or clearly erroneous (*infra*, pp. 5–12).

Indeed, the only "factual" conflict in this case, we shall show, is between Standard's present version of the facts, on the one hand, and Standard's prior admissions (including its formal answer and the testimony of its key officials), on the other.

A. THE COURT BELOW EXPRESSLY DENIED THAT THE CASE PRESENTED A "FACTUAL" QUESTION

In determining whether the court below based its decision on "legal" or "factual" grounds, certainly the court itself would be in the best position to know its own intention. On this matter, the court was quite explicit. At virtually the outset of its opinion, after quoting the decision of the Commission that Standard

had failed to meet its burden of proving "good faith," the court stated (R. 5496–5497):

> Whether the decision of the Commission under the attending circumstances represents a finding of fact or a *conclusion of law* is of importance. *We are of the view that it falls within the latter category*, and this notwithstanding the statement in Federal Trade Commission v. A. E. Staley Manufacturing Co., et al., 324 U. S. 746, 758:
>
> "Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission."
>
> The Commission in its brief appears to recognize that its decision on this critical issue is a conclusion of law * * * Certainly there is no dispute as to the evidentiary facts as found by the Examiner in the original proceeding. Referring thereto, the Commission in its brief states, "Here the facts as such are not in dispute, it is simply a matter of applying the law to the facts." Moreover, the Commission's decision on the "good faith" issue is *the result of its process of reasoning, legal in nature*, a portion of which, as we shall subsequently show, has been repudiated by the Supreme Court. Such being the case, *the weight to be attached to its decision is dependent upon the reasoning by which it is reached.* [Emphasis added.]

The court might also have referred to the following statement in Standard's brief below (p. 6): "*The con-*

trolling facts are not in dispute. The trial examiner's report * * * sets out the facts essential to a resolution of this case." (Emphasis added.) In addition, Standard's brief below (pp. 3, 14–16) repeatedly emphasized that the Commission's "own factual findings * * * establish [Standard's] 'good faith' *as a matter of law.*" (Emphasis added.)

We are unaware of any reason why this case—which the court below and both parties agreed was a "law" case—should now become a "fact" case on reaching the Supreme Court. The only supervening development is the action of the court below (after being assured by Standard that the controlling facts are not in dispute and that the Commission's own findings established "good faith") in setting aside the Commission's order. Thus Standard is no longer petitioning for relief but is seeking to protect its victory below. But that difference surely is insufficient to change the basic nature of the case. If a "*de novo* appraisal of the record" (Br. 29) was not essential in the court below, it likewise is not essential now.

Moreover, as the above-quoted excerpt from the opinion makes clear, the court regarded the "fact"-or-"law" question as one of "importance" because the answer to that question was, in the court's view, largely determinative of its scope of review over the Commission decision on the "good faith" issue. Having concluded that the Commission decision on that issue was "a conclusion of law" and "the result of its process of reasoning, legal in nature," the court stated that "the weight to be attached to [the Commission's] decision is dependent upon the reasoning by which it is reached." The court thus found that it was un-

fettered by the limitations which would have been otherwise applicable and in particular rejected the pointed admonition in the *Staley* opinion (324 U. S. 746, 758) against judicial interference with the Commission's fact-finding function in connection with the "good faith" issue.[2]

But Standard's argument—an extraordinary one in the circumstances—is that the court then proceeded to dispose of the "good faith" issue on "factual" grounds. If Standard were correct in that argument, it would mean that the court treated the "good faith" issue as one of "law" for the purpose of justifying freer review and then treated the issue as one of "fact" in deciding the case. Such action would in itself constitute reversible error. Surely it would be difficult to conceive of a clearer abuse of judicial power calling for correction by this Court in the exercise of its supervisory power. But the Court of Appeals, we believe, cannot be charged with having taken such action.

B. THE ALLEGED "FACTUAL" HOLDINGS OF THE COURT BELOW AS TO SPECIFIC OFFERS MADE BY STANDARD'S COMPETITORS ARE EITHER IMMATERIAL OR CLEARLY ERRONEOUS

While there are doubtless some statements of an apparently "factual" nature in the latter part of the

[2] See also *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, 73. In *Algoma*, this Court held that it was error for a reviewing court, in passing on the validity of a Federal Trade Commission order, "to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (*Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 61, 63) forbid that exercise of power."

opinion, those statements cannot be read as anything more than ambiguous dicta. Certainly they cannot be accepted as findings based upon a "*de novo* appraisal of the record."

For example, Standard (Br. 2, 25, 27, 48) places principal reliance on the following statement in the opinion: "[Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer." Standard (Br. 28) even argues that it is "*on the basis of these facts*" [Standard's italics] that the *Staley-Cement* doctrine was properly applied here. After quoting the court's statement, Standard asserts (*ibid.*) that "These price reductions made by [Standard] on widely separate occasions over a period of years to retain the business of four of its several hundred Detroit customers are surely 'individual competitive transactions' and 'situations' within the meaning of this Court's guides [in *Staley* and *Cement*]."

This contention can readily be shown to be clearly erroneous on three grounds.

1. Three of the four "jobbers" (Citrin-Kolb, Stikeman, and Wayne) were first granted the tank-car price by Standard prior to the enactment of the Robinson-Patman Act in 1936 (R. 5385–5386). Therefore, as was held by the hearing examiner (R. 1241) and by the *unanimous* Commission (including the two dissenting Commissioners on whom Standard relies) (R. 5387, 5416), any competitive offers on those "widely separate occasions" are wholly immaterial to

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prove justification for Standard's continuance of its discriminatory pricing policy *after* 1936.[3]

2. In any event, the record contains *no evidence* that Standard's tank-car price had been initially granted to these three "jobbers" to meet a competitor's offer of an "equally low price." Thus, Citrin-Kolb was initially granted "jobber" status and the tank-car price in 1928 (or 1929), but the first competitive offer was not made to Citrin-Kolb until 1930 (R. 1260–1269, 2003).[4] Stikeman was granted "jobber" status and the tank-car price in 1932, but there is no evidence of any competitive offer prior to that time.[5] More-

[3] Inconsistently, Standard later (Br. 41) recognizes that it is the *post*-1936 price discriminations which must be justified.

[4] This offer was by the Hiccock Oil Company after Standard had accorded "jobber" status and the tank-car price to Citrin-Kolb (R. 1261). Raupagh, Standard's Detroit Division Manager, testified concerning this "jobber" that "The first offer that I remember was about 19 ¢" (*i. e.*, the Hiccock offer) (R. 2002; see also R. 1321). Citrin testified that he had earlier questioned the Paragon Oil Company with respect to the availability of the tank-car price, but there is no evidence of any offer by Paragon to Citrin-Kolb (R. 1253–1254). As Citrin testified, "there was no price discussed at all" and Paragon's representative "was going to investigate" (R. 1254).

Nor is there anything in the record to indicate that the practice first got under way with the grant of the tank-car price to Citrin-Kolb. Raupagh testified that the "jobber" method had been an integral part of the gasoline marketing structure "ever since I have been in the oil business" (R. 1892). Dyer, another Standard witness, said the same (R. 940).

[5] The record does not show any competitive offer to Stikeman until after it had been accorded "jobber" status and the tank-car price. Standard subsequently lost this customer for a short time prior to 1936 (R. 2013). But its original classification as a "jobber" was apparently not preceded by any competitive offer.

over, as pointed out in Standard's answer (R. 9) and the *dissenting* Commission opinion (R. 5412), Standard granted Stikeman the tank-car price at the very inception of Stikeman's business. Standard therefore is quite in error in repeatedly asserting (Br. 2, 4, 6, 20, 27, 28, 31–32, 48, 65) that it only granted the tank-car price to retain a customer; for, with respect to Stikeman, Standard had no customer to retain when it granted the tank-car price. Similarly, there is no evidence of a competitive offer to Wayne prior to Standard's grant of "jobber" status and the tank-car price to Wayne in 1935.[*]

In these circumstances, it is apparent that the court below could not have made a "de novo appraisal of the record" as a basis for its assertion that "[Standard] sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to

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[*] Ledbetter, the president of Wayne, testified that his company "became a Standard Oil jobber" and thus obtained the tank-car price "when the volume increased to approximately 1,000,000 gallons per annum" (R. 983). He said (R. 984): "Well, the reason I got on that basis, or the principal reason, I believe, was the fact that I succeeded after two years' effort in selling them on the idea that I could do a better job for less money." Neither Ledbetter (R. 378–380, 982–985) nor Raupagh (R. 2011–2012) testified as to a competitive offer to supply the needs of Wayne's numerous stations.

It may also be noted that the record contains no evidence of any competitive offers to Stikeman or Wayne from the time of the passage of the Robinson-Patman Act to the filing of the complaint in this proceeding (R. 5386).

meet competitive offers in order to retain a customer." This assertion—which suggests that Standard accorded "jobber" status only involuntarily—is also in basic conflict with the extensive testimony of Standard's witnesses as to the commercial desirability of using "jobbers" (R. 1013–1023), including Marshall's acknowledgment that the question of whether to sell direct or through jobbers "was resolved on the economies and advantages of distribution, as the particular company viewed it at the time in the locality" (R. 1125; see also R. 1109). Another Standard witness,

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[7] For the same reasons, there is no foundation for Standard's assertion (Br. 48) that "Respondent's Lower Prices, Granted in Sporadic Instances to Hold Its Own Customers, Could Hardly Be Relied on by Competitors to Defend *Their* Price Discriminations."

It may also be noted that Standard's argument in the court below was quite different. There, Standard (Br. 12, 14) vigorously contended that its "good faith" was "conclusively documented" and "affirmatively demonstrate[d]" by the Commission's finding (see *infra*, pp. 22–23) that Standard's denial of the tank-car price to the four "jobber" accounts might result in their loss as customers since all four qualified for "jobber" status "under the commonly accepted standards of the industry" (R. 5388). As pointed out in our main brief (pp. 49–52), adoption of Standard's argument would immunize from the Act's requirements every discriminatory price formula followed by two or more sellers in the same industry; for, in those circumstances, each seller could justify his price formula on the basis of the availability of "an equally low price" from his competitor. Conversely, as we pointed out, adoption of Standard's argument would limit the Robinson-Patman Act to industries where sellers do not follow parallel pricing policies.

Dyer, detailed the advantages to a supplier of selling through "jobbers" (R. 959–960).[8]

3. Finally, even assuming *arguendo* that pre–1936 offers were material and that each of the four "jobbers" had been initially granted the tank-car price in response to a competitor's offer of an "equally low

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[8] Among the advantages he enumerated were the following: "the local jobber is usually a long-time citizen in the community" and hence can buy or lease property more advantageously "than some large company that comes in from the outside"; "[h]e is usually able to make a better selection of his employees," "get a higher degree of loyal and cooperative response" from them, and "frequently works his employees longer hours than his larger competitor"; "[h]e frequently doesn't have to pay the general market level of wages; and frequently doesn't pay it"; "he is not amenable or answerable to many laws" such as "chain store tax laws"; "[t]he Robinson-Patman Act, which has been the bane of most marketers' lives since it was passed some years ago, rests very lightly upon the local independent jobber."

This list of advantages is corroborated in large part by Cassady, *Price Making and Price Behavior in the Petroleum Industry*, pp. 199–200 (published in 1954 by the Yale University Press on a grant by the American Petroleum Institute). Professor Cassady states the following reasons for using "jobbers":

"1. Extensive distribution can be effected without large capital investment. As a corollary, suppliers may be able to secure important distribution facilities at minimum development costs by taking over established distributors.

"2. The jobber frequently is a power in his own community and may produce more business than would a salaried employee.

"3. The use of a distributor system may result in valuable jobber good will.

"4. Local distributors who own their own businesses have greater incentive to work hard and hence may be more productive.

"5. Jobber operations are advantageous if the need for price

price," it certainly does not follow that Standard would thereby be justified in continuing to grant the tank-car price regularly for an indefinite period. Typically, competitive offers are of limited duration; once such an offer expires, Standard can hardly say that it is only "meeting competition" in "individual competitive situations" if thereafter it accords the tank-car price to the customer year after year after year. The Section 2(b) defense does not provide a seller with an irrevocable license to discriminate after the "individual competitive situations" are past. Thus, if Standard (as its brief, pp. 28, 48, suggests) is now relying exclusively on specific competitive offers and not on "the mere 'availability' of lower prices" from competitors (Br. 48), then Standard must show that specific offers were kept open to each of the four "jobber" customers throughout the years in question. No such showing has been—or can be—made on this record.[9]

It should also be noted that, if Standard is now relying exclusively on specific competitive offers and not on "the mere 'availability' of lower prices" from

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cutting is indicated, since such operations can be utilized by suppliers as 'bargain basements.'

"6. Distributor operations eliminate the need for a great deal of accounting and sales supervision.

"It should be emphasized that no one plan of wholesale distribution is better than another under all circumstances. The question is, which one will deliver the highest overall realization under given circumstances? The answer is that companies are differently situated, with the result that different types of systems are called for depending on the circumstances."

[9] As to the alleged continuing offer of Red Indian to Ned's, see note 16, *ir fra*.

competitors (*ibid.*), then it necessarily follows that a reversal, without even the necessity of reaching the *Staley-Cement* issue, would be required in the event that the Court accepts the Commission's findings that Standard did not grant the tank-car price to any of the four "jobbers" in response to a specific competitive offer. The *Staley-Cement* issue arises from the Commission's further finding (R. 5388) that Standard had "substantial reasons for believing" that denial of the tank-car price to the four "jobbers" would result in their loss as customers; and that finding rests, not on any evidence of specific offers, but instead rests expressly and solely on the fact that all four qualified for "jobber" status "under the commonly accepted standards of the industry" and thus could probably obtain "recognition" as a "jobber" from a competitor following the same pricing policy (*ibid.*). Therefore, if we now are to confine ourselves to evidence of specific offers, this Court need go no further than decide (as we believe we have shown *supra*, pp. 5–11) that the court below clearly erred in stating that Standard "sold invariably at its uniform tank-wagon price, except when at different times it reduced its price to meet competitive offers in order to retain a customer" (R. 5501).

C. STANDARD'S USE OF A DUAL PRICE "POLICY," "PRACTICE," "SYSTEM" IS FULLY ESTABLISHED BY STANDARD'S ADMISSIONS THROUGHOUT THE PRIOR PROCEEDINGS

Equally without merit are the apparent assertions (R. 5500–5501) of the court below that the granting of the tank-car price to the four so-called "jobbers"

represented departures from a non-discriminatory price scale and that the tank-car price was not an established part of Standard's price scale. As demonstrated in our main brief (pp. 36–42), these "factual" assertions are flatly contradicted by Standard's admissions in the prior proceedings in this case.

Nor are we relying in this connection, as Standard (Br. 39) suggests, only on its formal answer. Although obviously the admissions in that answer are of great importance, it is only one of many items in the record (including extensive testimony by Standard key officials and Standard's statements to this Court in its 1950 brief) which cannot be reconciled with Standard's present version of the facts. For example, see Appendix A, *infra,* setting forth Standard's Exhibit 52–B, which details the operation of Standard's dual price formula during the 1936–1940 period. So inflexible was this formula that Marshall, the manager of Standard's gasoline department (R. 1058), testified that the four "jobber" customers "under general industry practice [were] absolutely entitled to buy on the tank-car basis" (R. 1062); that "it would seem almost an absurdity for any supplier to approach such a purchaser on any other basis" (R. 1086); that such a purchaser "couldn't be sold on any other basis" (R. 1117); and that "he would just be silly to continue to pay us a higher price" (R. 1104).[10]

[10] See also Marshall's testimony that "[i]n the oil industry we have a carload price and a tank wagon price and those who operate service stations have a service station price and these are the three units of purchase" (R. 1100). Again: "we have a tank wagon price, we have a tank car price, we don't have any

With respect to its answer, Standard does not, and cannot, deny that it made the detailed factual admissions concerning "its general policy and practice of bona fidely selecting and classifying gasoline customers as wholesale or jobber customers, as distinguished from retail resellers." But it argues (Br. 21, 39, 44) that those admissions were wholly directed to a separate defense of "functional customer classifica-

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service station price ourselves today because we don't operate service stations", (R. 1105; see also R. 1061–1062). And Raupagh, Standard's Detroit Division Manager, testified that Standard never departed from these two prices with the single "exception" (not material here) of the half-cent reduction to Ned's (R. 130, 167–169).

This testimony is in substantial accord with Fleming, *Oil Prices and Competition*, pp. 26–28 (published in 1953 by the American Petroleum Institute) (Italics in original):

"* * * another designation of prices is closer related to the retail or consumer-demand end. This includes the *tank-wagon price* and its usual corollary, the *tank-car price*.

"Competing methods long ago blurred the original meaning of these terms. But the *tank-wagon price* is still the established price of gasoline as delivered, originally by wagon, to the service station. It is, next to the price at the pump itself, the grass-roots price in the business, sensitive to all the influences which affect the ultimate consumer.

"Next before it, the *tank-car price* was originally, as the name indicates, the price in tank-car (that is, much larger) lots. Today the *tank-car price* is usually the contractual price made by suppliers to jobbers or wholesalers, regardless of whether the gasoline comes by rail, barge, pipeline or tanker.

* * * * *

"*Tank-wagon prices* have a powerful influence on *tank-car* prices. They usually move up and down fairly closely. The supplier's *tank-car* price to the jobber generally reflects what the supplier feels is a reasonable margin under the prevailing *tank-wagon* price."

See also Cassady, *supra* note 8, pp. 180–181, 198, 307.

tion." Even if this claim were so, it would have no significance; a respondent cannot adjust the facts to suit the requirements of various defenses. We need not concern ourselves with that problem, though, since the section of Standard's answer dealing with its "good faith" defense (R. 17) specifically "realleges by reference" those paragraphs dealing with Standard's defense of "functional customer classification." In addition, as pointed out above, the Government is relying here, not only on Standard's answer, but rather its admissions throughout the prior proceedings.

As we stated in our main brief (p. 42), it is immaterial what words are used to describe Standard's pricing of gasoline to its 362 Detroit customers (although Standard's present objections to "policy," "practice", "system" are somewhat surprising since it was Standard itself which first introduced those descriptions of its pricing).[11] The important factor, we repeat, is not the label but the content—namely, that Standard's pricing is not directed to "individual competitive situations" and that it "constantly results in

[11] Its answer (R. 13) referred to "its general policy and practice of bona fidely selecting and classifying gasoline customers" and "such system and practice of selection and classification of customers." See also, *e. g.*, the testimony of Marshall, the manager of Standard's gasoline department (R. 1060—"system") (R. 1062—"practice"); Boatwright, a Standard economist (R. 1375—"system"); Suffert, an official of the Texas Company (R. 1622—"practice"); Raupagh, Standard's Detroit Division Manager (R. 1887, 2065—"practice"). And, even in its exceptions to the trial examiner's report, Standard defended "the system of price differentials in the gasoline industry" (R. 5158).

[Standard's] getting more money for like goods from some customers than [it] does from others." *Staley*, 324 U. S. at 753; *Cement*, 333 U. S. at 725; *National Lead*, 352 U. S. at 431.

In the instant case, the admitted facts establish that Standard's pricing of gasoline to its 362 Detroit customers was pursuant to a discriminatory "policy", "practice", or "system" within the meaning of the *Staley-Cement-National Lead* doctrine:

1. Standard had but two prices for resellers: a "tank wagon" price to retail service stations, and a "tank car" price to so-called "jobbers" which was 1½ cents per gallon less than the "tank wagon" price.

2. Standard had fixed standards for determining which resellers would be charged the tank wagon price and which the tank car price.

3. The requirements for classification as a "jobber" were: a large volume of distribution (1 to 2 million gallons annually), a bulk plant capable of accepting deliveries of gasoline in tank car quantities, means of making deliveries from the bulk plant, and adequate credit standing.

4. These requirements were inflexible and rigidly followed; Standard would lose a customer before it would depart in any way from them or before it would increase the 1½¢ differential.

5. Every price found to be discriminatory in this proceeding was in exact accord with this pricing formula.

These five elements can add up to nothing other than a pricing "policy", "practice", or "system".

As a corollary to its denial that its pricing was pursuant to a "policy", "practice", or "system," Standard (Br. 39–40) denies that such pricing is common in the oil industry. But this too is directly contrary to the testimony of Standard's officials (R. 1073–1074, 1887). It is also contrary to the examiner's report (see *infra,* pp. 22–23), which Standard accepted in the court below (see *supra,* pp. 3–4). And, not content with the examiner's findings in this connection, Standard filed an exception (R. 5159):

> To the failure of the Trial Examiner to report on the following questions necessary to the decision of this case, to wit:
>
> (a) Is the trade practice complained of in these proceedings one which is widespread throughout the whole oil trade or industry in the United States, as well as in the Detroit, Michigan, area?
>
> This exception is made upon the ground that testimony was introduced to show that in the oil industry (1504, 1717, 1723, 2766, 2768, 2771) and in industry generally (1651), the dual type of merchandising operation here complained of is *universal throughout the United States;* thereby indicating the propriety of a Trade Practice Conference, in lieu of this proceeding. [Emphasis added.]

In addition, Standard stated (R. 5158) that:

> The evidence is uncontradicted in this proceeding that there are literally thousands of

> situations in the middle west, and in the entire United States, comparable to the operations of the four jobbers of Respondent in Detroit (1723). It is also established by the record (1764) that the *system of price differentials in the gasoline industry* is economically sound and fundamentally essential in the conduct of the business. [Emphasis added.]

Even the Commission *dissenting* opinion, on which Standard (Br. 64–65) now places so much emphasis, recognized that the discriminations involved here were pursuant to an industry "policy." The dissent urged that Section 2 (b) entitled Standard to continue adhering to the "policy" (R. 5418, 5419, 5420)—not that no such "policy" existed. And the dissent stated (R. 5416): "it was not an arbitrary classification by [Standard] * * * to favor these four jobbers with lower prices, inasmuch as the companies were qualified for ["jobber"] status *according to the commonly accepted standard in the industry.*"[12] (Emphasis added.) The dissent also pointed out (R. 5405) that "The basic, customary and prevailing *standards for qualification as a 'jobber' in the gasoline industry* are that the applicant for this status must pos-

[12] The Commission majority, of course, rejected industry practice as a justification for Standard's alleged functional classification (R. 5371–5372). This Court has since confirmed the correctness of the Commission's conclusion that competition in reselling is the decisive factor. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 474–475. See p. 28, *infra*.

sess a bulk storage plant, must possess a good credit rating, and must have some established business enabling it to purchase from one million to two million gallons per year" (emphasis added).

On the other hand, the Commission in this case has never charged, as Standard now intimates (Br. 39–40, 43–44), that all suppliers in the industry follow this practice,[13] or that those who do are in collusion, or that their prices are at all times precisely identical. By rebutting these fictitious contentions, Standard would presumably convey the impression of having undercut the Government's basic premise. But the Government has never made those contentions and does not make them now. Accordingly, Standard's arguments (Br. 29–35) that "The Competitive Turmoil in Detroit Tolerated No Pricing System" and "The Wide Range of Aggressive Competitive Offers Contradicts Any Systematic Industry Pricing" are directed at issues foreign to this case. We have set forth, both above (pp. 16–17) and in our main brief (pp. 36–42), those elements of Standard's pricing which preclude Standard's "good faith" defense here.[14]

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[13] Even the Commission's "Question Presented" (Br. 2) states only "that *some* of the seller's major competitors employ the same pricing policy". (Emphasis added.) See also p. 6, n. 3, of our main brief, pointing out that Socony-Vacuum and Sun sell in Detroit only at the tank-wagon price.

[14] Of course, if this Court affirms the Commission's decision and if other refiners thereafter presist in the same discriminatory practice, the Commission will take the necessary steps to enforce compliance. Standard (Br. 18–19), in attempting to treat the dismissal "without prejudice" of the three related com-

Standard's effort to impute a more drastic position to the Commission can only serve to becloud the real issues.

D. THE REPORT OF THE HEARING EXAMINER IS BASICALLY IN ACCORD WITH THE COMMISSION'S FINDINGS

Throughout Standard's brief (*e. g.*, pp. 13, 53) recurs the suggestion that there is a conflict on the "good faith" issue between the Commission's findings and the report of the hearing examiner. No such conflict exists, as we shall show.

But it should first be pointed out that, under the Commission's rules then in effect (1943), the examiner's report was "advisory only", *and the report itself so states* (R. 5128). 5 Fed. Reg. 2423, 2426, as amended, 6 Fed. Reg. 832, 833; 16 C. F. R. § 2.20 (Cum. Supp. 1938–1943). Such a report did not even have the effect of an initial decision, as is now the

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plaints (against Shell, Texas, and Gulf) as an abandonment of the proceedings, ignores the terms of the Commission's dismissal order and the fact of the Commission's initiation of an up-to-date investigation against the three companies. See our main brief, pp. 36, 47–48, n. 27. As there pointed out, it accordingly cannot be said, as the court below remarked (R. 5501), that there is "no contention and not even a suspicion but that the competing prices which [Standard] met were lawful." On the other hand, the court was obviously correct in stating that the Commission made "no finding" of illegality of competitors' prices. The Commission could not have done so since Standard—which has the burden of proof on the "good faith" issue—adduced no evidence as to the legality of its competitor's prices (although it did claim that its price policy was identical to the policies of some of its major competitors). See our main brief, pp. 6, 33–36.

case under the Administrative Procedure Act, 5 U. S. C. 1007, enacted in 1946. See 11 Fed. Reg. 7069. And Section 12 of the Administrative Procedure Act expressly provides that the Act's procedural requirements shall not apply retroactively to agency proceedings initiated prior to the effective date of those requirements. 5 U. S. C. 1011.[15]

In any event, the examiner's report is basically in accord with the Commission's findings. The examiner described Standard's "jobber" pricing policy (R. 5121), noted that each of the four "jobbers" met

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[15] See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 583. See also the committee reports accompanying the Administrative Procedure Act: "The word 'initiated' in the final clause of the section means a proceeding formally begun as by the issuance of a complaint by the agency (irrespective of prior charges or investigations) or of notice of a rule-making hearing." S. Rep. No. 752, 79th Cong., 1st Sess., pp. 29–30; H. Rep. No. 1980, 79th Cong., 2d Sess., p. 47.

The decision in *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, on which Standard relies (Br. 65), is certainly not to the contrary. In that case, both the Taft-Hartley Act and the Administrative Procedure Act had supervened between the Board's order and the Court of Appeals decision; this Court did no more than hold "that the scope of the court's reviewing power was governed by the legislation in force at the time that power was exercised" (p. 500). By the same token, the scope of the hearing examiner's power in the instant case "was governed by the legislation in force at the time that power was exercised"—*i. e.*, before the Administrative Procedure Act. The mere fact of the remand after passage of that Act cannot retroactively change the status of the examiner's report under Section 8 any more than it could retroactively qualify the examiner under Section 11. Cf. *Ford Motor Co.* v. *Labor Board*, 305 U. S. 364, 374.

Standard's criteria for the tank-car price (R. 5097–5098), and characterized all four (including Ned's, which resold exclusively at retail) as being, "*under industry practice* and contemplation, bona fide jobbers" (R. 5098). (Emphasis added.) As to the three "jobbers" other than Ned's, the examiner found that their selection and recognition by Standard as "jobbers" "were and are in *conformity with industry practice*" (R. 5098). (Emphasis added.) As to Ned's, the examiner was of the view that its recognition as a "jobber" was a "forced recognition given to retain that company's business" (R. 5098). The latter statement concerning Ned's was not accepted by the Commission, which found that the only subsisting offer open to Ned's— *i. e.*, from the Red Indian Oil Company on a gasoline ("Fleet Wing") which was a non-major "off brand" [16]—did not represent a serious competitive threat to Standard and that Standard did not meet this offer when it granted the tank-car price to Ned's (R. 5387). On the other hand, the Commission (R. 5388) recognized that Standard "had substantial reasons for believing" that it might lose the four "jobber" accounts if it did not regularly accord them the tank-car price, for the three other than

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[16] The president of Red Indian Oil Company testified (R. 3098): "My opinion is that Fleet Wing could not or is not considered a major brand gasoline and does not have the public acceptance of the four major brands previously mentioned." See also R. 1809–1810, 1815–1816, 1866.

Only nine bona fide "majors" operated in the Detroit area (R. 5106). See also Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, p. 6.

Ned's "had already been recognized as entitled to the tank car price *under the commonly accepted standards of the industry,* and Ned's had achieved a volume of distribution which brought it within the range where it was likely to be so recognized by a major oil company at any time." (Emphasis added.) "Thus," the Commission stated, "the real question is whether or not the actions of [Standard] in granting or continuing to these four dealers the tank car price *pursuant to and in accordance with its general policy* can be said to have been made in good faith within the meaning of Section 2 (b)." (Emphasis added.)

Standard (Br. 2, 10) somehow deduces a favorable answer to this question from the examiner's "Conclusion of Fact" that the price-differentials granted to the four "jobbers" were granted to meet equally low prices offered by competitors on branded gasolines of "comparable grade and quality" (R. 5104). But this "Conclusion of Fact," which is essentially the same as the last-quoted Commission finding (*i. e.,* that Standard "had substantial reasons for believing" that it might lose the four "jobber" accounts because all four qualified "under the commonly accepted standards of the industry"), says nothing of "good faith".[17] More-

[17] Standard (Br. 5–6, n. 3) apparently suggests that a "good faith" finding is implicit in the examiner's "Conclusion of Fact" because he recognized (R. 5105) the granting of the differentials as "lawful" except for his erroneous view that competitive injury precluded a Section 2 (b) defense. But if that argument shows anything, it suggests that possibly the examiner—as Standard now argues (Br. 28, n. 37)—believed the statutory language "in good faith" to be redundant in Section 2 (b). This Court's 1951 *Standard* decision, as well as *Staley*, holds

over, since the *Staley* case (1945) was decided subsequent to the examiner's report (1943), he could scarcely have considered the impact of that decision or the still later *Cement* decision (1948). In these circumstances, attempting to divine the examiner's thinking on the "good faith" issue is of only academic interest. Suffice to say that his report is, as shown above, basically in accord with the Commission's findings.[18]

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to the contrary. See our main brief, p. 28. It appears, furthermore, that Standard itself doubted that the examiner had made any finding on the "good faith" issue; for Standard filed an exception "To the failure of the Trial Examiner, in the Conclusion of Fact on Page 55 of said Report, specifically to answer in the affirmative, *or at all*, the question as to Respondent's good faith, as propounded in the Sixth Question on Page 50 of said Report" (R. 5152). (Emphasis added.)

[18] Standard's argument (Br. 9–10) that the Commission itself had previously recognized Standard's "good faith" is merely a restatement of the argument which Standard made—unsuccessfully—when the case was last here in 1950. Standard then urged that no remand would be necessary because the Commission had allegedly recognized Standard's "good faith." Reply Brief for Petitioner, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term, pp. 1–5, 16. On the other hand, the Commission brief (pp. 44–46) stated:

"* * * we wish to emphasize that the Commission has not conceded as a fact that petitioner's discriminations in price were in good faith to meet equally low prices of competitors. If it is inferred that the Commission has conceded this fact, such concession must be considered only for the purpose of this decision and not as a concession of actual fact.

"The Commission has not considered petitioner's 'good faith' as a factual issue and has made no finding of fact thereof. If this issue had been considered, the Commission may well have

E. APART FROM THE SECTION 2 (b) DEFENSE, STANDARD'S DUAL PRICE "POLICY", "PRACTICE", "SYSTEM" IS CLEARLY UNLAWFUL

1. Notwithstanding Standard's suggestion to the contrary (Br. 61–63), its price discriminations involved here are clearly unlawful unless "good faith" has been established under Section 2 (b). Standard denies that there was "any competitive 'injury' cognizable under the Robinson-Patman Act" (Br. 61). But the "injury" issue is foreclosed by the earlier Court of Appeals decision on that issue (R. 5293–5294, 5300). Having failed to seek review of that portion of the decision when it petitioned for certiorari in 1949, Standard cannot reopen the issue now.[19] This was recognized by the opinion presently under review (R. 5495).[20] In any event, this Court's decision in *Fed-*

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made a vigorous interpretation of the 'good faith' proviso of Section 2 (b). * * *

* * * * *

"If this Court should conclude that the Commission erred in its interpretation of Section 2 (b) and that the judgment affirming its order should, therefore, be set aside, this should not result in a decision permitting the petitioner to continue its discriminations in price if, in fact, the petitioner is not in good faith meeting equally low prices of competitors. On the contrary, in that event, it is submitted that the Court should direct that this case be remanded to the Commission for determination of the issue of 'good faith' tendered by the petitioner under Section 2 (b)."

Rejecting Standard's argument to the contrary, this Court adopted the Commission's proposal and remanded the case to the Commission to make findings on the "good faith" issue (340 U. S. at 238, 251).

[19] See Petition for Certiorari, *Standard Oil Co.* v. *Federal Trade Commission*, No. 1, 1950 Term.

[20] The court below stated (R. 5495) that "a number of the original contested issues have been adjudicated. In fact, on the

eral Trade Commission v. *Morton Salt Co.*, 334 U. S. 37, holding that the Act requires only a "reasonable possibility" of competitive injury, is fully dispositive of the issue; here actual injury was found (R. 5168–5179, 5300).[21]

In fact, Standard's discriminatory policy bears a striking similarity to the cumulative volume "quota discount" involved in *Morton Salt*. On that phase of the case, this Court was unanimous in supporting the Commission's decision. The separate opinion of Mr. Justice Jackson, joined by Mr. Justice Frankfurter, states:

> * * * The quota discounts allowed a customer are not related to any apparent difference in handling costs but are based solely on the volume of his purchases, which in turn depends largely on the volume of his sales, and these in turn are surely influenced by his lowered costs which he can reflect in his retail prices.
>
> I agree that these facts warrant a *prima facie* inference of discrimination and sustain a finding of discrimination unless the Company, which best knows why and how these discounts are arrived at and which possesses all the data as to costs, comes forward with a justification. I agree, too, that the results of this system on

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present review there are only two contested issues"—*i. e.*, "good faith" and the terms of the order. The court did not reach the latter issue.

[21] In considering the question of injury, it should also be noted that salt—the commodity involved in *Morton Salt*—is but a relatively small item in the grocery business. In contrast, gasoline—the commodity involved here—represents the very foundation of a service station's business.

> respondent's customer list is enough to warrant the inference that the effects "may be substantially to lessen competition or tend to create a monopoly."
>
> Even applying the stricter test of probability, I think the inference of adverse effect on competition is warranted by the facts as to the quota discounts. It is not merely probable but I think it is almost inevitable that the further ten-cent or fifteen-cent per case differential in net price of salt between the large number of small merchants and the small number of very large merchants, accelerates the trend of the former towards extinction and of the latter towards monopoly.

334 U. S. at 59–60; see also p. 61.

In comparing Morton's "quota discount" and Standard's "jobber" discount, it is of course true that Standard, in addition to requiring a volume of at least one to two million gallons a year, also required its "jobbers" to maintain storage and hauling facilities. But such facilities, as Standard's witnesses testified (R. 152, 2089), are readily available.[22] Thus, for present purposes, the only material criterion for Standard's discount is the annual gallonage requirement. Moreover, as pointed out by the hearing examiner (R. 5115), the cost of maintaining storage and hauling facilities was less than half-cent per gallon (see also R. 1124, 1818, 1821, 1879), whereas the dif-

[22] And Standard would not sell at the tank-car price to customers who had the facilities but lacked the gallonage (R. 179–180, 553, 557, 559). Nor would Standard permit tank-wagon customers to pool their purchases in order to meet the gallonage requirement (R. 147, 1256, 2084–2085).

ferential regularly accorded the "jobber" customers was 1½ cents per gallon—a discount of approximately 18.5% below the tank-wagon price Standard charged to its "non-jobber" customers.[23]

2. Nor can this discount be justified on a theory of "functional classification" (Br. 18, n. 28, 34–35, n. 46). That defense too is foreclosed by Standard's failure to present the issue for review in petitioning this Court for certiorari in 1949. The defense, in any event, is patently without merit; for Standard's "classification of its customers did not follow real functional differences". *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475.

As shown in the diagram set out in Appendix B, *infra,* Standard regularly sold at discriminatory prices to its 362 Detroit customers, all of whom competed in reselling to the consuming public. It is this factor of competition—rather than "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers" (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 475)—which is controlling.[24] To the extent that the 362 customers

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[23] This percentage is based on 1940 figures. See Appendix A, *infra.* According to Standard's witnesses, the "jobber" discount was much larger in other sections of the country. (R. 127, 972, 1064, 1890).

[24] Standard (Br. 35, n. 46) is wholly in error in stating that this conclusion "appears repudiated by the Commission itself." As authority for that proposition, Standard quotes a single sentence from what it calls "the opinion of the Commission in *Doubleday & Co., Inc.*, Dkt. 5897." But, of the four Commissioners concurring in the decision in that case, only *one*—the author of the opinion—supported the sentence quoted by Standard. Two other Commissioners filed opinions expressly disagreeing; and the fourth Commissioner merely concurred in the

do *not* compete (*i. e.*, with respect to wholesale sales to other retailers), the Commission's order (see *infra*, pp. 31–32) in no way precludes the continuance of the discount. The restraining effect of the order is, therefore, only on the gasoline which the "jobbers" themselves resell at retail.[25]

To reject this modest limitation on the ground that the so-called "jobbers" are entitled to a separate "functional classification", regardless of whether they resell at wholesale or retail, would be to defeat the very purpose of the Robinson-Patman Act. Almost any large buyer, after all, either maintains storage and hauling facilities or can easily obtain such facilities if it is to his financial benefit to do so. Congress, however, has decreed that a large buyer shall not have a price advantage over his smaller competitor "solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason

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result, which in no way turned on the question of functional classification. CCH Trade Reg. Rep. Transfer Binder, par. 25,634 (1955). Moreover, six months later, the Commission unanimously rejected a similar argument in *General Foods Corporation*, Dkt. 6018, CCH Trade Reg. Rep. Transfer Binder, par. 25,888.

See Shniderman, "*The Tyranny of Labels*"—*A Study of Functional Discounts Under the Robinson-Patman Act*, 60 Harv. L. Rev. 571.

[25] And, even on this gasoline, the Act would not bar Standard from giving its "jobber" customers a discount commensurate to Standard's cost savings through selling in bulk. The defenses provided in the Act, including the cost justification and meeting competition defenses, are necessarily read into every order. See *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470; *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419.

of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 43.

II. THE BRIEF OF THE "JOBBER" *AMICI*

The brief of the "jobber" *amici* (Br. 8–16, 26–27) is principally devoted to an attack on the terms of the Commission's order (R. 5391–5393).[26] The answer is twofold.

1. As the "jobbers" themselves recognize (Br. 10), the terms of the Commission's order are not before the Court, since the court below expressly refrained from passing on that phase of the case (R. 5495). Even Standard (Br. 2, n. 2) "agrees that the validity of the Commission's cease and desist order, which the Court of Appeals had no occasion to adjudicate, is not now here."

2. In any event, the attack of the "jobbers" on the terms of the Commission's order is either without merit or without present significance.

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[26] The "afterthought" argument of the "jobber" *amici* (Br. 17–19, 26–27) rests *solely* on the Commission's use of the term "policy" instead of "system" in Paragraph 14 of its findings (see, *e. g.*, R. 5388). As we have repeatedly stated (*e. g.*, *supra*, pp. 15–16), either word is equally appropriate. Standard itself had no difficulty seeing the *Staley* doctrine in the Commission's decision. In its formal objections to the decision, even prior to its formal promulgation, Standard stated (R. 5351): "The Commission, in Paragraph 14, employs language taken directly from *Federal Trade Commission* v. *Staley Co.*, 324 U. S. 746 (1945). It seeks by the use of such language to create the aura of analogy of *Staley* to the facts of this proceeding * * *."

The heart of the Commission's order is paragraph 1 (R. 5392).[27] With respect to this paragraph, which limits the "jobber" discount to gasoline sold at wholesale to other retailers (as distinguished from gasoline which the "jobbers" themselves sell at retail), the "jobbers" charge that the result would be "snooping, deception, control and abuse" (Br. 13). No such result is even conceivable, since every gasoline retailer is required by law to maintain detailed records of retail sales for tax purposes (see, *e. g.*, R. 2094–2095). Nor is there any merit to the contention (Br. 12) that the order takes no cognizance of the distribution function performed by "jobbers" through their storage and hauling facilities. Section 2 (a) of the Act expressly allows "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered"; and this Court's *Ruberoid* decision holds that the quoted proviso is read into every Commission order (343 U. S. at 475–476). Thus, Standard is free to grant a differential to the "jobbers" even on the gasoline which they themselves resell at retail; but the latter differential, based on Standard's cost savings, would necessarily have to be considerably smaller than the 18.5% discount involved here. See *supra*, pp. 27–28.

With respect to paragraph 2 (R. 5392), which would forbid Standard from discriminating "[b]y selling such gasoline to any retailer at a price known by [Standard]

[27] In fact, that portion of the complaint relating to paragraph 2 of the order was not part of the original complaint but was added by amendment (R. 34–36).

to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customer of" Standard, the Commission has determined that it will not seek affirmance of that portion of the order. Paragraph 2 was included for the purpose of relieving what in essence was a "captive market" situation—that is, the inability of the "non-jobber" customers to obtain, either from Standard or from the wholesaler "jobbers," preferential prices which the wholesaler "jobbers" were granting in some instances to their sub-dealers. On the other hand, it was not the purpose of the Commission to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler "jobbers." Because of the problems necessarily involved in the enforcement of paragraph 2, and in view of the need "to reconcile [an administrative] interpretation, except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress" (*Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 74), the Commission has now concluded that other methods (*e. g.*, a proceeding under Section 5 of the Federal Trade Commission Act or under Section 3 of the Clayton Act) would be more appropriate to reach the evil at which paragraph 2 was directed.[28]

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[28] It should also be noted that the order, even without paragraph 2, forbids discrimination "directly or through any corporate or other device" (R. 5392). Thus, even without paragraph 2, the order is sufficiently broad to preclude Standard from using a subsidiary or "dummy" wholesaler to undercut Standard's tank-wagon customers.

The balance of the order is fully in accord "with the broader antitrust policies that have been laid down by Congress" (*ibid.*). In fact, it is difficult to see how the purpose of the Sherman Act, which also emphasizes price flexibility "in individual competitive situations", is much advanced by Standard's rigid adherence over the years to an inherently discriminatory pricing policy. Such a policy, on the other hand, cannot be reconciled with the commands of the Robinson-Patman Act, as we have sought to show above and in our main brief.

The judgment below, we respectfully submit, should be reversed.

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NOVEMBER 1957.

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APPENDIX A

The following exhibit (R. 4872) was introduced by Standard in the administrative proceeding:

RESPONDENT'S EXHIBIT NO. 52-B

STATEMENT OF—DEALER TANK WAGON PRICES—JOBBER TANK CAR PRICES—JOBBER MARGINS—PREVAILING RETAIL PRICES—RETAIL DEALER MARGINS—ON STANDARD RED CROWN GASOLINE FROM JANUARY 1, 1937 TO MARCH 6, 1941

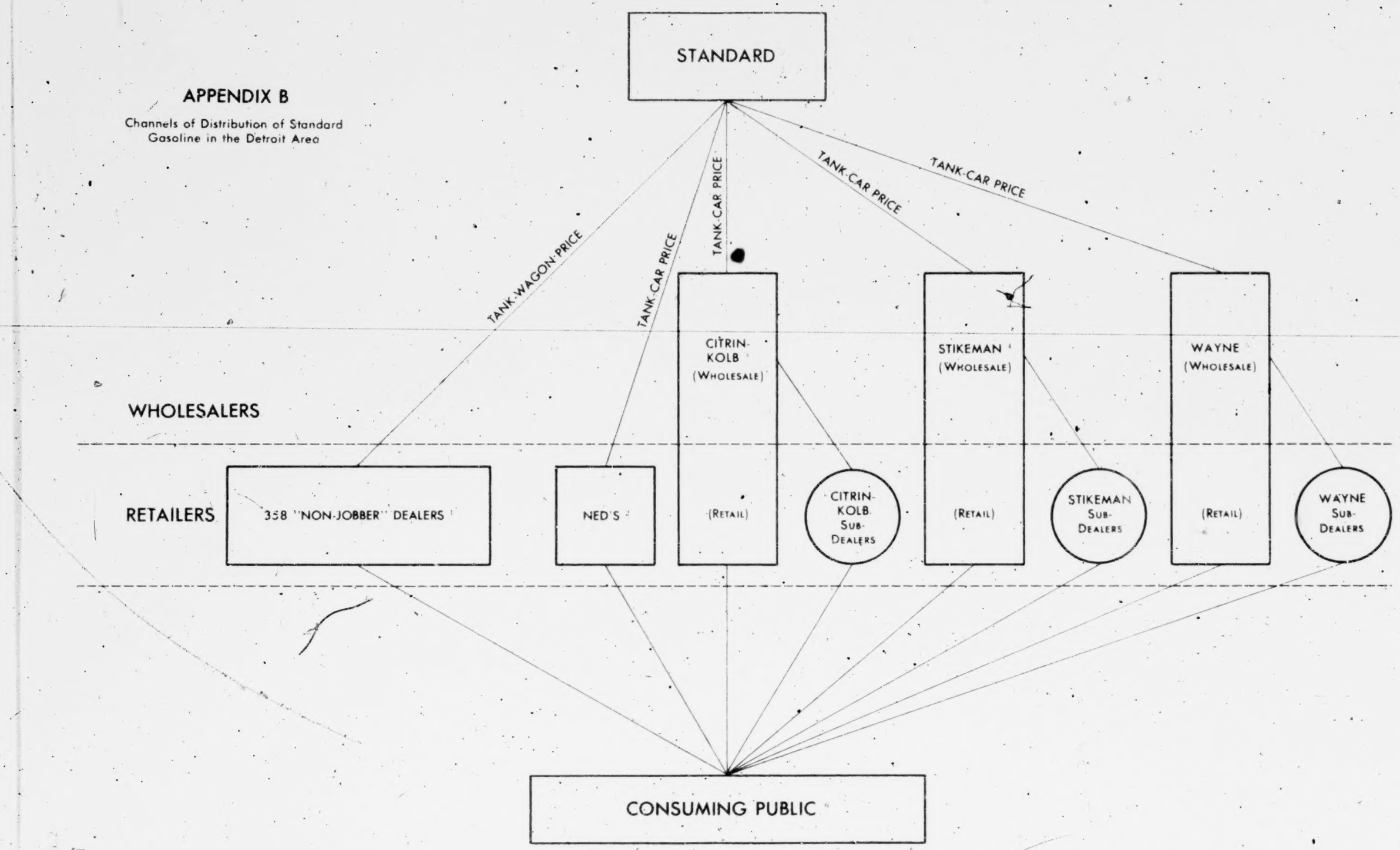
(All Prices Shown Are Cents Per Gallon Exclusive of All Taxes)
(Jobber and Retail Dealer Margins Shown in Cents Per Gallon)

Period	Dealer Tank Wagon Prices in Effect	Jobber Tank Car Prices In Effect at which purchases of four named Jobbers were billed	Jobber Margin, ie.: Difference between Dealer Tank Wagon Prices and Jobber Tank Car Prices in Effect	Prevailing Retail Service Station Prices in Effect on "Regular" Brand of Gasoline of Major Companies including the Standard Oil Company		Retail Dealer Margin Difference between Dealer Tank Wagon Prices & Prevailing Retail S.S. Prices in Effect
Jan. 1, 1937 to Feb. 2, 1937	9.0	7.5	1.5	13.0		4.0
Feb. 2, 1937 to May 12, 1937	9.6	8.1	1.5	13.6		4.0
May 12, 1937 to Nov. 3, 1937	9.9	8.4	1.5	14.1		4.2
Nov. 3, 1937 to Mar. 28, 1938	9.6	8.1	1.5	14.1		4.5
Mar. 28, 1938 to July 22, 1938	9.8	8.3	1.5	14.3	Mar. 28, 1938 to May 10, 1938	4.5
				13.8	May 10, 1938 to June 21, 1938	4.0
				12.3	Jun. 21, 1938 to July 22, 1938	2.5
July 22, 1938 to Dec. 9, 1938	8.8	7.3	1.5	12.3	July 22, 1938 to Sept. 6, 1938	3.5
				12.1	Sept. 6, 1938 to Dec. 9, 1938	3.3
Dec. 9, 1938 to April 10, 1939	7.6	6.35	1.25	10.0	Dec. 9, 1938 to Feb. 20, 1939	2.4
				10.7	Feb. 20, 1939 to Apr. 10, 1939	3.1
April 10, 1939 to June 17, 1939	7.6	6.1	1.5	10.7		3.1
June 17, 1939 to Oct. 31, 1939	8.1	6.6	1.5	11.4		3.3
Oct. 31, 1939 to Nov. 11, 1939	7.4	6.15	1.25	9.3		1.9
Nov. 11, 1939 to Nov. 18, 1939	6.4	5.4	1.0	9.3		2.9
Nov. 18, 1939 to Current Date 3-6-14	8.1	6.6	1.5	11.4		3.3

445379 O-57 (Face p. 34) No. 1

APPENDIX B

Channels of Distribution of Standard Gasoline in the Detroit Area



[4] Approximately 81.7% of Standard gasoline sold in the Detroit area is sold through these 358 customers (RX23). 208 of the 358 are lessees of Standard under leases of a year or more (R. 5367; CX1A to 1D). The other 150 "non-jobber" customers are required by contracts to purchase all of their requirements of Standard gasoline at the tank-wagon price (R. 5367, CX2).

[5] Citrin-Kolb was first accorded "jobber" status and the tank-car price in 1928 or 1929 (R. 5369, 5385).

[6] Stikeman was first accorded "jobber" status and the tank-car price in 1932 (R. 5370, 5386). In 1938, Stikeman discontinued the operation of its own retail service stations (R. 5370).

[7] Wayne was first accorded "jobber" status and the tank-car price in 1935 (R. 5370, 5386).

[8] Throughout the proceeding, Standard has conceded that the "non-jobber" service stations [illegible] in selling at retail to the consuming public (R. 9).